

MEMO# 35675

April 11, 2024

SEC Deputy Enforcement Director Identifies Relevant Factors in Off-Channel Communications and Marketing Rule Penalties

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TO: ICI Members SUBJECTS: Compliance

Litigation & Enforcement RE: SEC Deputy Enforcement Director Identifies Relevant Factors in Off-Channel Communications and Marketing Rule Penalties

Last week, Deputy Director Sanjay Wadhwa of the Securities and Exchange Commission's Division of Enforcement provided a non-dispositive list of factors the Division evaluates when assessing penalties in off-channel communication and investment adviser marketing rule actions.[\[1\]](#) Following remarks highlighting the Division's efforts over the last fiscal year,[\[2\]](#) Deputy Director Wadhwa listed several factors influencing the Division's recordkeeping and marketing rule penalties, emphasizing that the penalties are not chosen randomly but determined on an individualized basis. We briefly summarize the factors below.

Recordkeeping Factors

The Deputy Director listed the following factors that influence recordkeeping violation penalties, which recently have ranged from \$2.5 million to \$125 million:

- **Firm Size.** The size of the firm, including the firm's revenues from the regulated parts of its business and the number of registered professionals at the firm;
- **Scope of the Violations.** The scope of the violations, including the number of individuals who communicated off-channel and how many off-channel communications there were;
- **Compliance Efforts.** A firm's efforts to comply with its recordkeeping obligations and prevent off-channel communications;
- **Past SEC Settlement Orders.** Past precedent from other SEC-settled orders in similar matters;
- **Self-Reporting.** Whether a firm self-reported, which the Deputy Director twice noted was the factor most likely to significantly lower penalties; and

- Investigation Cooperation. Cooperation with Enforcement staff during Division investigations.

Marketing Rule Factors

Deputy Director Wadhwa listed the following factors that influence penalties in adviser marketing rule actions, which recently have ranged from \$50 million to \$175 million.

- Assets Under Management. A firm's reported regulatory AUM;
- Firm's Regulatory History. The firm's regulatory history, including the nature of any prior enforcement actions;
- Remediation. Whether the firm promptly remediated the noncompliant marketing materials;
- Deterrence. The need to send strong messages of accountability and deterrence; and
- Self-Reporting and Investigation Cooperation. Whether a firm self-reported and cooperated with the investigation.

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Notes

[1] See Sanjay Wadhwa, Deputy Director, Division of Enforcement, SEC, Remarks at the Practising Law Institute's The SEC Speaks In 2024 (Apr. 3, 2024), available at <https://www.sec.gov/news/speech/sanjay-wadhwa-sec-speaks-2024-04032024>. "Off-channel communications" refer to the use of various communications platforms that fall outside an investment adviser's official recordkeeping channels.

[2] For the first part of his speech, Deputy Director Wadhwa cited statistics on enforcement actions, administration proceedings, whistleblower awards, and distributions to harmed investors.

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